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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 272

THE STATE OF OHIO EX REL. JAMES CLAKE,
PLAINTIFF IN ERROR,

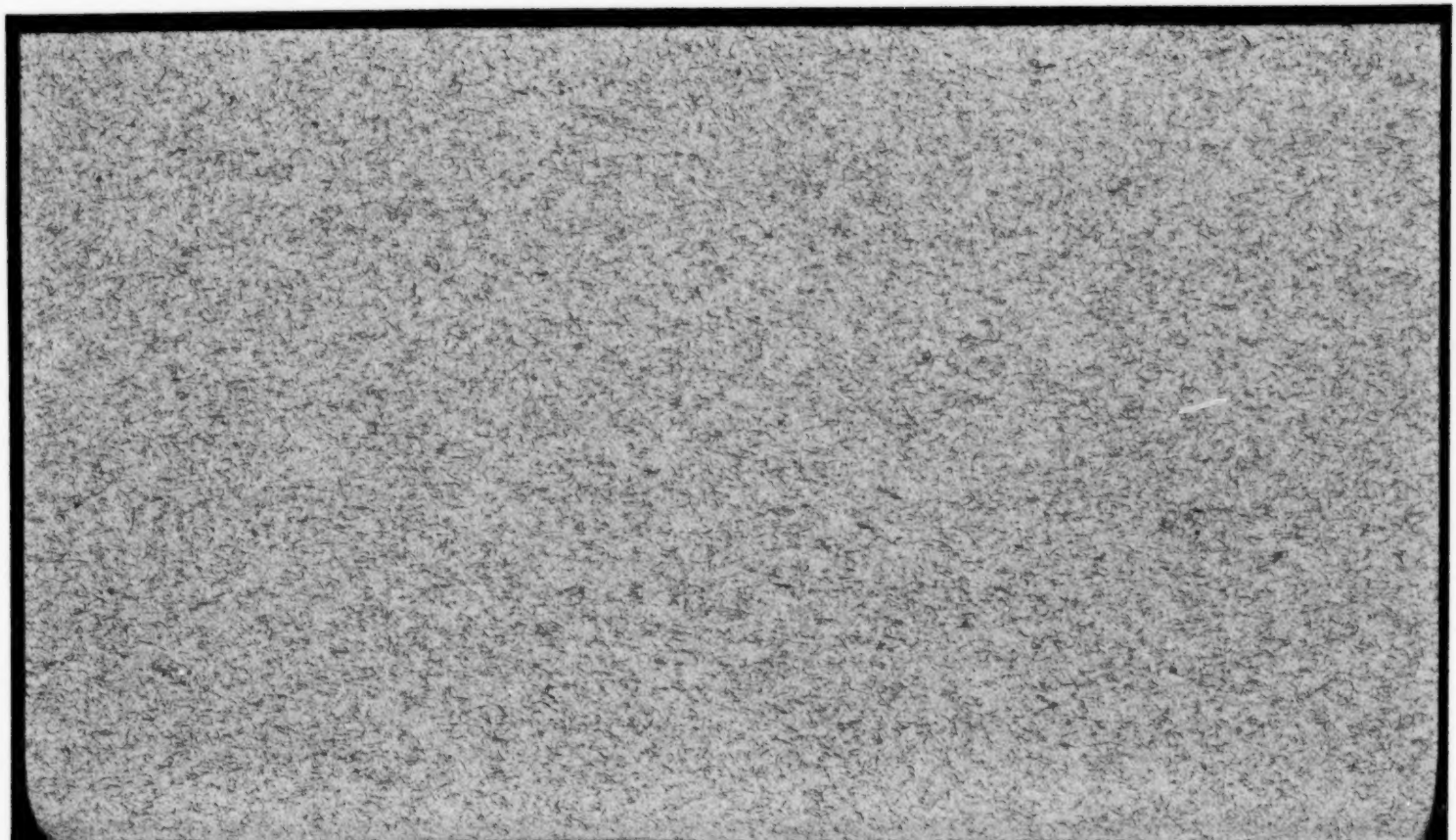
vs.

ALFRED F. DECKEBACH, AS AUDITOR OF THE CITY OF CINCINNATI, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 272.

THE STATE OF OHIO ex Rel. JAMES CLAKE,
Plaintiff in Error,

vs.

ALFRED F. DECKEBACH, as Auditor of the City of Cincinnati, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

For reply to the argument of defendant in error that the pleadings do not show that the plaintiff in error is a subject of the King of England, we call attention to the fact that the Ohio Supreme Court considered the legal effect of a motion for judgment on the pleadings and said (Record, page 19): "Whether

or not those allegations correctly state the character of pool rooms and the state of mind of subjects of foreign countries, the motion for judgment upon the pleadings assumes the truth of all those allegations. In view of the allegations of the answer, admitted as they are by the motion for judgment upon the pleadings," etc.

The defendant argued in that court that there was a denial in the answer that the relator is a British subject.

Nevertheless that court determined that the pleadings were sufficient to show the citizenship, considering the admissions in the answer (Record, page 11), "although respondent admits that he refused to receive said application and issue such license, by reason of the statement of the relator to this respondent that he was a subject of the King of England," coupled with the allegation of the petition that relator was a subject of the King of England.

In the case of Reinman *vs.* Little Rock, 237 U. S., 171, this Court said in a case exactly in point, at page 178, "this Court is not so closely restricted as before to the face of the record to ascertain what was decided in the State Court, and may examine the opinion, when properly authenticated, so far as may be useful in determining that question," *i. e.*, to ascertain what was decided.

We further say that the rules of this Court provide that the opinion of the Court below must be printed for the use of this Court, and the opinion in this case

clearly shows that the Court below considered that this plaintiff in error was, beyond question, a subject of the King of England.

AS TO THE POWER OF THE POLICE TO PROHIBIT ENTIRELY.

In some few jurisdictions the business may be prohibited, but there is no such instance in the city of Cincinnati or the State of Ohio. It is a lawful business in Ohio, and Section 3670 of the General Code provides as follows in the chapter entitled "Municipal Corporations—Enumeration of Powers," Subtitle "Licenses":

> "SEC. 3670. Licenses—Manicuring, etc.—To regulate and license manufacturers and dealers in explosives, pawnbrokers, chattel mortgage and salary loan brokers, peddlers, public ball-rooms, scavengers, intelligence offices, BILLIARD ROOMS, bowling alleys, livery, sale and boarding stables, dancing or riding academies or schools, race courses, ball grounds, street musicians, second-hand dealers, junk shops, and all persons engaged in the trade, business or profession of manicuring, massaging or chiropody. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient."

CLASSIFICATION.

In the summary of the Supplemental Brief of Defendant in Error he says (page 30): "In conclusion,

we submit that the fundamental question in this case is whether the classification created by the ordinance is a valid one."

We desire to point out that the defendant in error has only commented upon nine out of the fifty-seven authorities cited by plaintiff in error.

Every opinion, of course, is to be read having regard to the facts of the case and the question actually decided. Simply taking a paragraph from any case and quoting the paragraph, without showing the facts of the case upon which the language of the court is based and the question involved, cannot be of benefit.

As an instance, the defendant in error cites the following cases as authority that a classification on the basis of citizenship has been recognized as within the equal-protection clause and as a reasonable basis for distinction in the instant case:

Cockrill *vs.* California, 268 U. S., 258.
Frick *vs.* Webb, 263 U. S., 326.
Porterfield *vs.* Webb, 263 U. S., 225.
Terrace *vs.* Thompson, 263 U. S., 197.
Webb *vs.* O'Brien, 263 U. S., 313.

These cases all involve the same question, namely, the right of an alien to own or lease land.

This Court has consistently recognized the power of the States with respect to the ownership of lands by aliens, and that, *in the absence of a treaty to the contrary,* a State has power to deny aliens the right to own land within its borders.

This denial is easily understood when we remember that at common law aliens were incapable of owning land.

But this disability of aliens at common law in respect to the ownership of real estate does not extend to personal property or to the rights contended for by this plaintiff in error under the Fourteenth Amendment, and for this reason we submit that these authorities are not of aid in the present case.

LIQUOR CASES.

Another line of cases much relied upon by the defendant in error is that in which aliens were denied the right to engage in the saloon or liquor business, and he cites the following:

Trageser *vs.* Gray, 9 L. R. A., 780.
Bloomfield *vs.* Ohio, 86 O. S., 253.
Ohio *ex rel.* Lloyd *vs.* Dollison, 194 U. S., 445.

We pointed out in the Brief of Plaintiff in Error (page 14) these liquor cases were not applicable to the case at bar.

Justice Stephen J. Field, speaking for this Court, said that "the liquor traffic was the most prolific source of misery, insanity, vice and crime," and since that time the liquor business has been prohibited throughout the length and breadth of the land by the adoption of a Federal amendment to the Constitution.

We submit that nowhere have the charges against the traffic had more pronounced and unequivocal ex-

pression than in the formal findings of the courts of the United States. Beginning with this Court, and following down through the various Federal and State courts, there is an unbroken line of decisions which leaves the saloon no legal standing whatever. For instance, the courts have declared that A CITIZEN HAS NO INHERENT RIGHT to traffic in intoxicants; that no State can be compelled to license or permit it; that the liquor traffic is inimical to public health, morals and safety, and that it is the chief source of crime, vice and misery; and some courts have held that saloons are common nuisances and as such may be abated at any time.

In our opinion, the expressions and condemnations of this Court, followed as they were by the State courts, had most to do in molding public opinion, which finally resulted in the Eighteenth Amendment.

We urge that there is no analogy between the denial to aliens of the right to engage in the liquor business and the case at bar.

Anton *vs.* Van Winkle, 297 Fed., 340:

A case much relied upon by the defendant in error, as shown on page 20 of his Supplemental Brief, is that of Anton *vs.* Van Winkle, and part of the opinion of the district judge is printed.

It is worthy of note that this opinion is based upon the case of Balli vs. Carroll, 99 O. S., 285, the forerunner of the case at bar, and which Balli decision we now challenge in this action, inasmuch as the Ohio

Supreme Court has followed its former decision in the Balli case.

The Anton case involved the validity of a statute of Oregon, "No county, city, town or municipality shall issue a license to any PERSON NOT A CITIZEN OF THE UNITED STATES, to engage in the PAWNBROKER's business, or in the business of conducting a POOL OR BILLIARD HALL, card room or dance hall," and the United States district judge in Oregon held the ordinance valid, as we have said, upon the authority of the Balli case.

But since the decision in this Anton case, which, by the way, was decided on February 25, 1924, the very day the case of Asakura *vs.* Seattle was argued in this Court, the Supreme Court of the State of Oregon has authoritatively spoken in the case of George *vs.* City of Portland, 114 Oregon, 418, decided April 28, 1925, involving an ordinance prohibiting the issuance of a license to sell certain SOFT DRINKS to any person not a citizen of the United States, passed under authority of chapter 163 of the General Laws of Oregon.

The court considered the State statute which prohibited aliens from engaging in various businesses, and held that aliens are entitled in Oregon to the same treatment accorded to natural-born citizens, and declared invalid the statute which was in conflict with the Fourteenth Federal Amendment.

The decision of the Oregon Supreme Court in construction of its own State statute is superior to that of the United States district court in Oregon.

It is worthy of note that the Oregon Supreme Court expressly commented upon and refused to follow other

cases largely relied upon by defendant in error, namely:

Commonwealth *vs.* Hana, 195 Mass., 262 (peddler).
Trageser *vs.* Gray, 9 L. R. A., 780 (liquor).
Anton *vs.* Van Winkle, 263 U. S., 340 (billiards).

The same statute (chapter 163 of the General Laws of Oregon for 1923), which was declared unconstitutional on April 18, 1925, is the one upon which the United States district court passed in the Anton case, involving billiard tables, on February 25, 1924.

Patsone *vs.* Pennsylvania, 232 U. S., 138:

The defendant in error (pages 16 and 19) tries to show that the case of Patsone *vs.* Pennsylvania is important for our consideration. We answer, in the words of the court, "It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens, if it pleases."

Murphy *vs.* California, 225 U. S., 623,

is cited by the defendant in error in support of his contention that under the police power the city has power to prohibit entirely the operation of pool rooms.

We do not understand it so. The facts before the court were entirely different from those of the case at bar. The Pasadena ordinance prohibited the keep-

ing of billiard rooms for hire, but permitted hotels of twenty-five or more rooms to operate a billiard room for the use of its guests. The question involved was not a classification between citizens and aliens, as in our case. Under the Pasadena ordinance any alien who owned a hotel of twenty-five rooms could keep a billiard room for the use of his guests, the same as if the proprietor were a citizen of the United States. And so the court held that the classification as to twenty-five-room hotels was a reasonable one.

Gizzarelli *vs.* Presbery, 44 R. I., 333:

The question involved was an ordinance of the city of Providence providing that a license to operate a motor bus should not be granted to an alien.

At page 335, "Authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual, but is in the nature of a privilege" (17 R. I., 230; 91 N. J. L., 506). The ordinances in question were enactments made in the exercise of the police power delegated to the city council by the legislature (44 R. I., 207).

IN CONCLUSION.

We maintain that the city of Cincinnati cannot decline to grant a license to plaintiff in error merely because he is an alien.

Aliens are within the equal-protection clause as fully as citizens, except in the following cases:

a. The right of the State to prohibit the ownership of lands within its border, there being no treaty to the contrary.

b. The right of the State to limit the right to take the common property of the State, such as fish, to citizens of the State.

c. The right of the State and of a municipality to employ none but citizens on public work.

d. The power to limit the right of franchise to citizens of the State.

Respectfully submitted,

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.

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No. 272.
October Term, 1926.

Supreme Court of the United States

THE STATE OF OHIO ex rel. JAMES CLAKE,
Defendant in Error,

vs.

ALFRED F. DECKEBACH as Auditor of The City of Cincinnati,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR DEFENDANT IN ERROR

John D. Ellis,
City Solicitor.

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Supreme Court of the United States

THE STATE OF OHIO, EX REL. JAMES CLARKE,
Plaintiff in Error,

No. 272. *vs.*

ALFRED F. DECKEBACH, as Auditor of The City of Cincinnati,
Defendant in Error.

Brief for Defendants in Error

The pleadings in this cause consist of the petition for mandamus and the answer of the respondent, and the relator's motion for a judgment on the pleadings.

THE FACTS AS SHOWN BY THE PLEADINGS.

The petition alleges that the relator is a subject of the King of England and a resident of the City of Cincinnati; that the respondent is the duly elected, qualified and acting Auditor of the City of Cincinnati, and as such it is his duty to receive applications for and issue pool and billiard-table licenses in the City of Cincinnati; that on April 22, 1925, the relator applied to the respondent for a pool and billiard table license for the year 1925 for five pool and billiard tables at 1413 Central avenue in the City of Cincinnati, and that the respondent refused to receive such application and to issue a license thereunder by reason of the fact that

the relator is an alien, and that Ordinance No. 76-1918 of the Code of Ordinances of the City of Cincinnati, passed February 28, 1918, provided * * * "that no license shall be issued to a person who is not a citizen of the United States."

The relator alleges that said ordinance is in violation of and contrary to the treaties of commerce between the United States and Great Britain and invokes the protection of said treaties and especially "national treatment" and "most favored nation" clauses thereof; and further that the said ordinance is in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to him the equal protection of the law.

The answer of the respondent admits that he is the Auditor of the City of Cincinnati and that as such Auditor it is his duty to receive applications for and to issue pool and billiard table licenses in the City of Cincinnati as required by the ordinances of said city; that the relator applied to him on April 22, 1925, for a pool and billiard table license for said year, and that he refused to receive said application and to issue a license thereunder; that on February 26, 1918, as alleged in the petition, the council of the City of Cincinnati passed Ordinance No. 76-1918, which provided: * * * "that no license for a billiard or pool table shall be granted to a person who is not a citizen of the United States." That he has no personal knowledge that the relator was at the time he applied for such license a subject of the King of England, and therefore denies that he was such subject, although admitting that he refused to receive said application and issue such license by rea-

son of the statement of the relator to him that he was such subject.

The respondent in further answering alleged that pool and billiard rooms are and have been meeting places of idle and vicious people, and are and have been the means of contributing to juvenile delinquency; that numerous crimes and offenses against the state laws and city ordinances have been committed therein; that such places are frequented by law-breakers and an undesirable class of persons, thereby requiring the most strict surveillance of the police department of the City of Cincinnati, and that as a class persons who are not citizens of the United States are not as familiar with the laws and customs thereof as are native born or naturalized citizens, and that pool and billiard rooms maintained by persons not citizens of the United States are therefore a menace to society and the public welfare, and that the ordinance complained of by the relator is a reasonable police regulation, adopted in the interests and for the benefit of the general public, and that said ordinance is a reasonable one.

The answer of the respondent further contains a general denial of all matters in the petition not admitted in said answer to be true.

I.

Plaintiff in Error Not Entitled to Mandamus on the Facts as Admitted In the Pleadings.

The motion of the relator for a judgment on the pleadings admits the allegations in the answer of the respondent. Among these is a denial that the relator

is a subject of Great Britain, and those allegations concerning the character of persons who frequent pool and billiard halls; the crimes committed therein; the attention required thereof by the police department of the city, and that citizens o fthe United States, either native born or naturalized, are more familiar with the laws and customs of this country than are aliens, and that pool and billiard halls maintained by persons who are not citizens are a menace to the public welfare.

The causes therefore that led the city council to adopt this ordinance being admitted, there is further admitted the existence of certain evils that the city council sought to remedy, bringing the ordinance fairly and squarely within the holding of the supreme court of the United States, that there is no power to review such legislative action unless it has no real nor substantial relation to the subject-matter of the ordinance and the end sought by it, or is beyond all question a plain palpable abuse of rights secured by the fundamental law.

Jacobson v. *Mass.*, 197 U. S., 11.
Mugler v. *Kas.*, 123 U. S., 623.
Minn. v. *Barber*, 136 U. S., 313, 320.
Atkin v. *Kansas*, 191 U. S., 207, 223.

The supreme court of Ohio, therefore, had before it only the pleadings in this case which disclosed a denial of the essential fact that relator was a British subject and affirmative allegations fully sustaining the city council in its exercise of control over pool rooms. Since the motion for judgment on the pleadings admits the material allegations of the answer the Ohio court properly refused to grant a writ of mandamus.

II.

The Treaty Between the United States and Great Britain Does Not Protect the Operation of a Pool Room.

The ordinance in question is set forth in the brief of opposing counsel but for the convenience of the court is herein repeated.

> "*An Ordinance* No. 76-1918, Providing for the licensing of billiard and pool tables by amending original Section 777 of the Code of Ordinances of the city of Cincinnati.
>
> "*Be it ordained* by the Council of the city of Cincinnati, State of Ohio:
>
> "Section 1. That original Section 777 of the Code of Ordinances of the city of Cincinnati be and the same is hereby amended to read as follows:
>
> "Section 777. Billiard Table, etc.—Each proprietor of a billiard or pool table shall pay a license of twenty-five ($25.00) dollars per annum for one such table and fifteen ($15.00) dollars per annum for each additional table; provided however that no license shall be granted to a person who is not a citizen of the United States.
>
> "Section 2. That said original Section 777 of the Code of Ordinances be and the same is hereby repealed.
>
> "Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.
>
> "Passed February 26, A. D. 1918.
>
> "Carl M. Jacobs, Jr., *Vice-Mayor.*
>
> "Attest: Fred Schneller, *Clerk.*
>
> "Approved: John Galvin, *Mayor.*
>
> "Feb. 28, 1918."

This ordinance was passed under the general powers of municipalities as conferred by the General Code of Ohio, and the authority for the passage of the ordinance in question, is not denied, unless, as opposing counsel claims, the ordinance is invalid by reason of the decision of the supreme court of the United States in the case of *Asakura* v. *City of Seattle,* 265 U. S., 332, decided May 26, 1924.

This case has no bearing however on the case at bar, as the treaties between Japan and the United States, and Great Britain and the United States are distinctly different. The former treaty provides that "The citizens or subjects of each of the High Contracting Parties shall have the liberty to enter, travel and reside in the territory of the other, to carry on *trade,* wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice * * * and generally to do anything incident or necessary for trade upon the same terms as native citizens or subjects * * *." (Treaty and Protocol between United States and Japan, proclaimed April 5, 1911.)

It will be noted that this treaty gives the right to carry on "trade," and the Seattle ordinance under consideration by the supreme court defined a "pawnbroker" to "mean and include every person whose business or occupation is to take and receive by way of pledge, pawn or exchange goods, wares and merchandise of any kind or any personal property whatever for the repayment of security or any money loaned thereon, or to loan money on deposit of personal property," and defined a pawnshop to "mean and include every place in which the business of pawnbroker is carried on."

The supreme court therefore held that there was no

question but that the operation of a pawnshop as defined by the ordinance in question constituted carrying on a business or trade, and that, therefore, such business or trade was protected by the terms of the treaty in question.

The treaty between the United States and Great Britain is of an entirely different character and is in fact nothing more than is indicated by its title "A Convention—To regulate the *commerce* between the territories of the United States and his Brittannick majesty." (United States Statutes at Large, page 228, Foreign Treaties.) This treaty was adopted July 3, 1815, but has been continued in force by subsequent conventions in the same language, which probably accounts for the peculiarity of the spelling found therein.

The treaty contains the following clause:

> "Art. I. There shall be between the territories of the United States of America, and all the territories of his Britannick majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countires, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

It will be noticed that there is no reference in this

article to carrying on trade but that the treaty merely provides "protection and security for their commerce, *but "subject always to the laws and statutes of the two countries, respectively."*

It is apparent therefore that the High Contracting Parties to this convention having in contemplation a treaty referring only to commerce have taken ample steps for the protection of the purpose for which the treaty was adopted, and that, therefore, the Seattle case, which construed the terms of an entirely different treaty, can have no bearing upon the subject-matter under consideration in this case.

If this construction is too narrow, it will be further noted that the protection and security guaranteed by Article I quoted above, and the privileges granted thereunder are "subject always to the laws and statutes of the two countries, respectively." It was therefore clearly within the contemplation of the High Contracting Parties that whatever privileges were granted, respectively, to the citizens of either nation were subject at all times to the laws and statutes of both Great Britain and the United States.

Accordingly, under the terms of this treaty, no one can complain if a license or special privilege is conferred upon one person and denied to another.

> "A license is a permission to do something which would not be allowed without such license. *State* v. *Frame,* 39 O. S., 399, III Longsdorf's Notes, 1038; *Bloomfield* v. *State,* 86 O. S., 253.
>
> "A license creates a right that did not exist and could not exist without the license. *Adler* v. *Whitbeck,* 44 O. S., 539, IV Longsdorf's Notes, 231.

> "A license is permission granted by some competent authority to do an act, which without such permission would be illegal. *State* v. *Hipp*, 38 O. S., 199, III Longsdorf's Notes, 965."

III.

The Operation of a Pool Room Is Not a "Trade" Nor "Commerce."

Neither is the operation of a pool room the carrying on of a business or trade. The term "trade" has a well-settled meaning, and has been defined upon numerous occasions. "Trade" is the business of exchanging commodities by buying and selling for money. *United States* v. *American Tobacco Co.*, 164 Fed., 700, 708, "Trade" within the Bankruptcy Act (Act July 1, 1898, c. 541, Section 4b, 30 Stat., 547) is the buying and selling of merchandise or any class of goods, deriving a profit therefrom. *In re Hudson River Electric Power Co.*, 173 Fed., 934, 947.

To "trade" is to engage in the purchase or sale of goods, wares and merchandise. *Jackson* v. *Town of Union*, 73 Atl., 773, 774; 82 Conn., 266 (citing Century Dictionary).

> "The owning, controlling, and leasing of theaters, and the producing of plays and entertainments, and the booking of contracts for the production of plays, is not 'trade or commerce,' within the Penal Code, Section 168, subds. 5, 6, prohibiting a conspiracy to commit any act injurious to 'trade or commerce.' *People* v. *Klaw*, 106 N. Y. Supp., 341, 350, 55 Misc. Rep., 72 (citing Webst. Dict.; Stand. Dict.; 2 Bouv. Law Dict., 1127; Jac. Law Dict.; *United*

States v. *Cassidy,* 67 Fed., 698; *United States* v. *Coal Dealers' Assn.,* 85 Fed., 252; *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.), 1, 6 L. Ed., 23; *Henderson* v. *New York,* 92 U. S., 259, 23 L. Ed., 543; *Welton* v. *Missouri,* 91 U. S., 275, 23 L. Ed., 347; *Hannibal & St. J. R. Co.* v. *Husen,* 95 U. S., 465; 24 L. Ed., 527.)"

IV.

The Cincinnati Ordinance Does Not Violate the Constitution of the United States.

The exact question raised by the relator in this case has previously been passed upon by the supreme court of Ohio in *State, ex rel. Balli* v. *Carrel,* 99 O. S., 285, the syllabus of which is as follows:

> "A municipal ordinance purporting to regulate and license pool and billiard rooms, which contains a provision that 'no license shall be granted to a person who is not, by reason of such provision, a citizen of the United States,' is not in conflict with any provision of the state or federal constitution."

In discussing this case the court quotes with approval *Schmidinger* v. *City of Chicago,* 226 U. S., 578, where it was held:

> "The right of the legislature, or the municipality under legislative authority, to regulate one trade and not another is well settled as not denying equal protection of the laws. * * *
>
> "Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police reg-

ulation, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority."

This court also refers to the Constitutional provision of the state of Ohio, which reads as follows:

> "License to traffic in intoxicating liquors shall not be granted to any person who at the time of making application therefor is not a citizen of the United States and of good moral character." Section 9, Article XV.

This same subject was also considered by the Ohio supreme court in *Bloomfield* v. *State*, 86 Ohio St., 253, in which the claim was made that a similar provision found in the General Code of Ohio (100 Ohio Laws, 89) was contrary to the Constitution of Ohio and that of the United States. At page 266 the court said:

> "We do not think the statutes of Ohio and of other states, which have barred aliens from the liquor traffic in the manner stated have arisen from a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under our institutions. But they are based on the belief, that an alien cannot be sufficiently acquainted with our institutions, and our life, to enable him to appreciate the relation of this particular business to our entire social fabric. When he has become more familiar with the spirit of the American people and their laws and has become a citizen, he will easily and readily (in the conduct of the business) assist in the furtherance of the policy of the state."

The same question has been decided by other jurisdictions. *Heim* v. *McCall*, 239 U. S., 175:

> "The provisions of Section 14 of the Labor law of 1909 of New York that only citizens of the United States shall be employed on public works, and that preference shall be given to citizens of that state, is not unconstitutional under the privilege and immunities clause of the Constitution of the United States or under the equal provision of due process clause of the Fourteenth Amendment thereto, or as violative of the Treaty of 1871 with Italy." (Syl.)

At page 193:

> "The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.
>
> "The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.
>
> "There were slight modifications of these provisions in the treaty of 1913, as follows: 'That the citizens of each of the high contracting parties shall receive, in the States

and Territories of the other, the most constant security and protection for their persons and property and for their rights. * * *

"Construing the provision of 1871 the Court of Appeals decided that it 'does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.' The conclusion is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in *Patsone* v. *Pennsylvania*, 232 U. S., 138, 145, and a convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign-born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the state over its wild game which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the state over the subject-matter, a power which exists in the case at bar, as we have seen.

"From these premises we conclude that the Labor Law of New York and its threatened enforcement do not violate the Fourteenth Amendment or the rights of plaintiffs in error

thereunder nor under the provisions of the treaty with Italy."

Tragesser v. *Gray*, 9 L. R. A. (1890), Maryland Court of Appeals, page 780:

> "The Legislature may prohibit or restrict the sale of spirituous liquors in any manner which its discretion may dictate. No one can claim as a right any power whatever to sell such liquors; if he sells at all it must be on such terms as the Legislature sees fit to impose." (Syl. 1.)
>
> "A state's denial to persons not citizens of the United States of the right to obtain licenses to sell spirituous liquors within its borders is not a discrimination against them, or an abridgment of their rights within the prohibition of the 14th Amendment of the Constitution of the United States." (Syl. 2.)

At page 783:

> "Under every system of government, there must be power in some of its departments to provide for the regulation of the internal affairs of the state. Public morals, public health, public order, peace and tranquility are objects of cardinal importance to the well-being of society. Without the power to protect and preserve these interests, civilized government could not exist. The limit and extent of this power are somewhat vague and undefined."

At page 784:

> "It was thought proper to confine the licenses to citizens of the United States of temperate habits and good moral character. The privilege is very liable to be abused, and abuses

would produce great public detriment. It therefore seemed wise to the Legislature to confer it only on those who being natives of the country, might reasonably be supposed to have a regard for its welfare; or who not being natives had, as required by Naturalization Law, proven by creditable testimony before a court of justice that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticize its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of this state."

* * * * * * * * *

"It has been uniformly held in all courts that no clause in the Federal Constitution interferes with the power of the states to promote and protect the public health, peace, morals, and good order within their respective limits."

At page 786:

"It has been maintained that the appellant (*Tragesser*) has rights under existing treaties which have been infringed by the denial of licenses to aliens. Our opinion on this question has been sufficiently indicated, but a few more words may be added. If we assume, for the sake of argument, that Tragesser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that any-

> one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a state. Such power is original, inherent and exclusive: it has never been surrendered to the general government, and never can be surrendered, without imperiling the existence of civil society."

Inasmuch, therefore, as the operation of a pool room is not a "trade" and is not the subject of the convention between the United States and Great Britain, it is respectfully submitted that the petition in error should be dismissed.

Respectfully submitted,

JOHN D. ELLIS,
City Solicitor.

SUPPLEMENTAL

BRIEF

Office Supreme Court, U. S.
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No. 272.
October Term, 1926.

Supreme Court of the United States

THE STATE OF OHIO, ex rel JAMES CLARK,
Plaintiff in Error,

vs.

ALFRED F. DECKEBACH,
as Auditor of the City of Cincinnati,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR

John D. Ellis,
City Solicitor of Cincinnati, Ohio,
Attorney for Defendant in Error.

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Supreme Court of the United States

THE STATE OF OHIO, EX REL. JAMES CLARKE,
Plaintiff in Error,

No. 272. *vs.*

ALFRED F. DECKEBACH, as Auditor of The City of Cincinnati,
Defendant in Error.

Supplemental Brief for Defendant in Error.

Statement of the Case.

This case comes before the court upon writ of error to the Supreme Court of the State of Ohio. Since we cannot agree with the statement of the case as made by plaintiff in error (Brief, pp. 1-2) it is necessary at the outset to state briefly the pleadings upon which the case was decided by the Ohio court.

The case was tried upon the petition in mandamus filed in the Ohio Supreme Court by plaintiff in error, the answer of defendant in error and the motion for judgment on the pleadings filed by plaintiff in error.

I. The Petition.

The petition (Rec., pp. 6-8) alleges that the relator is a subject of the King of England and a resident of the city of Cincinnati; that the respondent is the duly

elected, qualified and acting Auditor of the city of Cincinnati, and as such it is his duty to receive applications for and issue pool and billiard table licenses in the city of Cincinnati; that on April 22, 1925, the relator applied to the respondent for a pool and billiard table license for the year 1925 for five pool and billiard tables at 1413 Central avenue in the city of Cincinnati, and that the respondent refused to receive such application and to issue a license thereunder by reason of the fact that the relator is an alien, and that Ordinance No. 76-1918 of the Code of Ordinances of the city of Cincinnati, passed February 26, 1918, provided * * * "that no license shall be issued to a person who is not a citizen of the United States."

The relator alleges that said ordinance is in violation of and contrary to the treaties of commerce between the United States and Great Britain and invokes the protection of said treaties and especially the "national treatment" and "most favored nation" clauses thereof; and further that the said ordinance is in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to him the equal protection of the law.

II. The Answer.

The answer of the respondent (Rec., pp. 10-12) admits that he is the auditor of the city of Cincinnati and that as such auditor it is his duty to receive applications for and to issue pool and billiard table licenses in the city of Cincinnati as required by the ordinances of said city; that the relator applied to him on April 22, 1925, for a pool and billiard table license for said year, and that he refused to receive said application and to issue

a license thereunder; that on February 26, 1918, as alleged in the petition, the council of the city of Cincinnati passed Ordinance No. 76-1918, which provided: * * * "That no license for a billiard or pool table shall be granted to a person who is not a citizen of the United States." That he has no personal knowledge that the relator was at the time he applied for such license a subject of the King of England, and therefore denies that he was such subject, although admitting that he refused to receive said application and issue such license by reason of the statement of the relator to him that he was such subject.

The respondent in further answering alleged that pool and billiard rooms are and have been meeting places of idle and vicious people, and are and have been the means of contributing to juvenile delinquency; that numerous crimes and offenses against the state laws and city ordinances have been committed therein; that such places are frequented by law-breakers and an undesirable class of persons, thereby requiring the most strict surveillance of the police department of the city of Cincinnati, and that as a class persons who are not citizens of the United States are not as familiar with the laws and customs thereof as are native born or naturalized citizens, and that pool and billiard rooms maintained by persons not citizens of the United States are therefore a menace to society and the public welfare, and that the ordinance complained of by the relator is a reasonable police regulation, adopted in the interests and for the benefit of the general public, and that said ordinance is a reasonable one.

The answer of the respondent further contains a general denial of all matters in the petition not admitted in said answer to be true.

III. Motion for Judgment on the Pleadings.

No reply was filed by the relator and upon the issues joined in the petition and answer the relator moved for judgment on the pleadings. (Rec., p. 12.)

We submit that upon this record there is no warrant for the statement of plaintiff in error that "Respondent filed an answer admitting all the facts alleged in the petition" (Brief, p. 2). Not only did the respondent not admit the allegations, he specifically denied one of the basic facts of plaintiff in error's action, upon which his alleged right to the protection of the British treaty depends, viz., that relator was a subject of the King of England. (Rec., p. 11.)

Nor are there anywhere in the record allegations supporting the statements in the plaintiff in error's brief relating to the content of the "license" chapter of the Cincinnati Code of Ordinances. (Brief, p. 2, first par.) Only Ordinance No. 76-1918 was pleaded and this is the only one before the court. No citation of authorities is necessary on the point that this court cannot take judicial notice of municipal ordinances. We shall see later how plaintiff in error has forgotten this rule in his argument.

The plaintiff in error has also failed to point out in his brief the affirmative allegations of the answer setting forth the facts relating to the local conditions in Cincinnati under which pool rooms are conducted and their operation by aliens. These facts were pleaded in justification of the ordinance and they cannot be ignored by plaintiff in error.

ARGUMENT

I.

The Plaintiff in Error Is Not Entitled to the Protection of the British Treaty.

The first point relied upon by the plaintiff in error (Rec., p. 21, Brief, p. 3) is that the ordinance violates the treaty of commerce between the United States and Great Britain whose protection is invoked, particularly the "national treatment" and "most favored nation" clauses thereof.

A.

The Plaintiff in Error Is Not a British Subject and Therefore Is Not Entitled to the Protection of the British Treaty.

We submit that upon the record before the court the plaintiff in error is not entitled to the protection of the British treaty. By his motion for judgment on the pleadings plaintiff in error chose to submit his case upon the facts pleaded in the petition and answer, admitting all of the facts alleged in the answer.

Ohio General Code, Section 11601.
1 Bates Pleading and Practice (Ohio), 426-427.
31 Cyc., 606.
Dailey v. *Chappell,* 12 O. C. C. (N. S.), 561, 565.
Rheinheimer v. *Ins. Co.,* 77 O. S., 360, 372.
McCoy v. *Jones,* 61 O. S., 119.
Railroad Co. v. *Nobil,* 85 O. S., 175.

The petition alleged that plaintiff in error was a subject of the King of England. The answer denied that allegation. Upon motion for judgment the fact now be-

fore the court is that plaintiff in error is not a British subject. This is not merely because plaintiff in error has failed to offer any evidence to sustain the burden of proof; he has by his motion actually admitted that he is not a subject of Great Britain.

Walling v. *Brown,* 9 Idaho, 184, 72 Pac., 960.

It is elemental to say that only a British subject is entitled to the protection of the British treaty and that since plaintiff in error is not before the court as such a subject he cannot invoke that treaty for his protection.

It is no answer to this argument to point out that defendant admits that the license was refused "by reason of the statement of relator * * * that he was a subject of the King of England." (Rec., p. 11.) This is important as showing why the license was refused but it does not help plaintiff in error to prove that he actually is a British subject. The fact that he "stated" that he was such and was refused a license because of such statement is no evidence of the correctness of his claim.

We submit, therefore, that upon the record plaintiff in error is not a subject of the King of England and therefore is not entitled to the protection of the treaty with Great Britain.

B.

The British Treaty Does Not Protect the Operation of a Pool Room.

The above, we believe, sufficiently answers the first contention of plaintiff in error but since the supreme court of Ohio in its opinion (Rec., p. 15) and plaintiff in error in his brief (Brief, pp. 4-15) discuss the British

Treaty we shall reply briefly, assuming, for the sake of argument, that plaintiff in error actually is a British subject.

Neither the record nor the brief disclose the particular treaty relied upon but following the opinion of the Ohio Supreme Court we may conclude that the "Convention to Regulate the Commerce Between the Territories of the United States and His Britannic Majesty" is meant (8 United States Statutes at Large, Foreign Treaties, p. 228). This treaty was adopted July 3, 1815, and has been continued in force by subsequent conventions in the same language.

The full text of the treaty is quite lengthy and will not be quoted here but the only article that could possibly apply to the instant case reads as follows:

> "Art. I. There shall be between the territories of the United States of America, and all the territories of his Britannic majesty in Europe, a reciprocal liberty of commerce. The inhabitants if the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

This treaty provides for a "reciprocal liberty of commerce" and that "the merchants and traders of each

nation, respectively, shall enjoy the most complete protection and security for their commerce."

We submit that the operation of pool tables is not "commerce" and that the operator of a pool room is not a "merchant" or "trader."

1.

Plaintiff in error in his brief (pp. 5-6) devotes some space to an argument based upon certain alleged language in the Cincinnati ordinances purporting to define the operation of billiard tables as a business or trade. Again we must point out that there is no such evidence in this case. The ordinances referred to were not referred to in the pleadings nor offered in evidence. Since the court cannot take judicial notice of their alleged existence they cannot be considered. Nowhere in the record is there reference to any definition by the defendant in error or by the city and there can therefore be no estoppel as claimed by plaintiff in error.

2.

Coming now to legal definitions of the term "commerce," "merchant" and "trader," we submit the following authorities:

Bouviers Law Dictionary (Ed. 1897):

> "Commerce—The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit."
>
> "Merchant—One who is engaged in the purchase and sale of goods."

May v. *Sloan*, 101 U. S., 231, 237:

> "The word 'trade' in its broadest signification includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce or traffic generally."

Jackson v. *Town of Union*, 82 Conn., 266:

> "The owning, controlling, and leasing of theaters, and the producing of plays and entertainments, and the booking of contracts for the production of plays, is not 'trade or commerce,' within the Penal Code, Section 168, subds. 5, 6, prohibiting a conspiracy to commit any act injurious to 'trade or commerce.' *People* v. *Klaw*, 106 N. Y. Supp., 341, 350, 55 Misc. Rep., 72 (citing Webst. Dict.; Stand. Dict.; 2 Bouv. Law Dict., 1127; Jac. Law Dict.; *United States* v. *Cassidy*, 67 Fed., 698; *United States* v. *Coal Dealers' Assn.*, 85 Fed., 252; *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.), 1, 6 L. Ed., 23; *Henderson* v. *New York*, 92 U. S., 259, 23 L. Ed., 543; *Welton* v. *Missouri*, 91 U. S., 275, 23 L. Ed., 347; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S., 465; 24 Ed., 527)."

Much reliance is placed by plaintiff in error upon the case of *Asakura* v. *City of Seattle*, 265 U. S., 332. We distinguish that case upon the following grounds.

a. The Japanese treaty invoked in that case is much more specific in its terms than is the British treaty. It provides in part that "The citizens of each of the high contracting parties shall have liberty * * * to carry on trade, wholesale and retail * * * and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects." (37 Stat. at Large, 1504.) No such comprehensive language is found in the British treaty, and it is not necessary to give it such a broad construction.

b. The Seattle Ordinance was shown to define pawnbrokers as carrying on a "business." This further warranted including pawnbroking in the term trade. In the case at bar the Cincinnati Ordinance contains no such definition of the operation of billiard tables.

c. There is a vital difference between lending money on collateral security as does a pawnbroker and renting the use of a billiard or pool table. The former has always been recognized as a legitimate form of business subject to regulation but not to prohibition. The latter has always been regarded by the law as a privilege subject to either regulation or prohibition under the police power of the states.

Murphy v. *California*, 225 U. S., 623, 630.

Pawnbroking is a part of the commercial, economic life of society. The renting of the privilege of playing billiards or pool is an amusement which may be suppressed entirely if necessary for the public safety, health or morals.

We submit, therefore, that even if we were to assume for the sake of argument that plaintiff in error actually is a British subject entitled to the protection of the British treaty, the terms of that treaty do not cover the maintenance and operation of billiard and pool tables.

II.

The Ordinance Does Not Deny to the Plaintiff in Error the Equal Protection of the Law.

The second point relied upon by plaintiff in error (Rec., p. 21, Brief, p. 15) is that the Cincinnati Ordinance is void and in contravention of Section One of

the Fourteenth Amendment to the Constitution of the United States, in that it denies to him and other aliens the equal protection of the law.

A.

The Ordinance Is a Valid Exercise of the Police Power of the City.

Plaintiff in error does not question the right of the city to pass an ordinance regulating or prohibiting the operation of pool and billiard tables. We wish to point out specifically, however, how broad are these powers.

Under the Ohio Constitution a city has so called "Home Rule Powers."

Ohio Constitution, Art. XVIII, Sec. 3:

> "Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws."

It is well established in the Ohio law that under this provision the powers of municipalities are derived from the people through the constitution and not through the legislature.

Billings v. *Cleveland Ry. Co.,* 92 O. S., 478.
Fitzgerald v. *Cleveland,* 88 O. S., 338.

The state of Ohio has never attempted to prohibit or regulate pool rooms and therefore the police power in this respect is entirely in the city.

B.

Under the Police Power the City Has the Power to Prohibit Entirely the Operation of Pool Rooms.

Since, as we have seen, the city exercises the police power over pool rooms, its power to prohibit them entirely has been sustained in many reported cases.

In *Murphy* v. *California*, 225 U. S., 623, the validity of an ordinance of the city of South Pasadena prohibiting the operation of pool rooms except in hotels was passed upon. The court held that such a prohibition was constitutional and that although playing at billiards was not a nuisance *per se* * * * "it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant" (p. 629). The court then quotes with approval the following language from *Booth* v. *Illinois*, 184 U. S., 425, 429:

> "If looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless looking through the forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

The court then continues:

> "Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. *Tanner* v. *Albion*, 5 Hill, 121; *City of Tarkio* v. *Cook*, 120 Mo., 1; *City of Clearwater* v. *Bowman*, 72 Kan., 92; *City of Corinth* v. *Crittenden*, 94 Miss., 41; *Cole* v. *Village of Culbertson*, 86 Neb., 160; *Ex parte*

Jones, 97 Pac., 570.

"Indeed, such regulations furnish early instances of the exercise of the police power by cities, for Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places."

The case at bar presents a peculiarly strong case for the exercise of the police power of the city. The city in its answer alleged certain facts relating to pool and billiard halls in Cincinnati. These facts are admitted to be true by the plaintiff in error. They are (Rec., p. 11):

1. Pool and billiard halls in Cincinnati are meeting places of idle and vicious people.

2. They are the means of contributing to juvenile delinquency.

3. Numerous crimes and offenses have been committed therein.

4. They are frequented by law-breakers and an undesirable class of persons.

5. They require the most strict surveillance on the part of the police.

Such are the admitted facts with reference to the conduct of pool rooms in Cincinnati. We submit that they offer specific evidence of the "harmful tendency" of which this court seems to have taken judicial notice in *Murphy* v. *California*, *supra*, at p. 629.

We therefore submit that under its police power and in view of the admitted facts as to the evils arising from the operation of pool rooms in Cincinnati, the city had full power to regulate or prohibit their operation.

C.

The Mere Fact of Classification of Those to Whom a Law Applies Does Not Violate the Equal Protection Clause of the XIV Admendment So Long As All In the Same Class Are Treated Alike.

The ordinance in question clearly creates two classes with reference to the operation of pool rooms. Aliens may not be granted a license; citizens of the United States may secure the privilege. There is no claim that within these classes there is not equal protection of the laws.

This court has in many cases held that the states have the right to recognize classes of persons or property in applying their laws.

In *Cockrill* v. *California*, 268 U. S., 258, 262, the court held:

> "The equal protection clause does not require absolute uniformity or prohibit every distinction in the laws of the state between ineligible aliens and other persons within its jurisdiction. The state has a wide discretion and may classify persons on bases that are reasonable and germane, having regard to the purpose of the legislation."

Truax v. *Corrigan*, 257 U. S., 312, 337:

> "In adjusting legislation to the need of the people of a state, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary * * *."

Terrace v. *Thompson*, 263 U. S., 197, 218.

> "Classification is the most inveterate of our reasoning processes. We can scarcely think or

> speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real semblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand."

See also

Barrett v. *Indiana*, 229 U. S., 26, 29.
Singer Sewing Machine Co. v. *Brickell*, 233 U. S., 304.
Patsone v. *Pennsylvania*, 232 U. S., 138.

We conclude, therefore that classification does not violate the equal protection guaranteed by the constitution so long as the classes created are on a basis that bears a reasonable relation to the purpose of the legislation.

D.

The Court Will Not Disturb a Law Providing for Classes of Persons Unless It Can Clearly Hold That There Is No Reasonable Basis for the Classification.

The courts have always been slow to hold that a legislative enactment was invalid, particularly where the law required a knowledge of local conditions which were attempted to be remedied.

In *M. K. & T. Ry. Co.* v. *May*, 194 U. S., 267, the court says, p. 269:

> "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for

the law that would not require with equal force its extension to others whom it leaves untouched."

Barrett v. *Indiana*, 229 U. S., 26, 29:

"The equal protection of the law requires laws of like application to all similarly situated but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make laws and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

Patsone v. *Pennsylvania*, 232 U. S., 138, 144:

"But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience * * *. The state 'may direct its laws against what it deems the evil as it actually exists without covering the whole field of possible abuses' (citing authorities). The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in as-

suming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent.

"*Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. Adams* v. *Milwaukee*, 228 U. S., 572, 583. *If we might trust popular speech in some states it was right—but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong.*" (Italics ours.)

See also:

Crescent Cotton Oil Co. v. *Miss.*, 257 U. S., 129, 137.

Middleton v. *Texas Power & Light Co.*, 249 U. S., 152, 157.

Rast v. *Van Deman*, 240 U. S., 342, 357.

Keokee Consol. Coke Co. v. *Taylor*, 234 U. S., 224, 227.

E.

A Classification on the Basis of Citizenship Has Been Recognized as Within the Equal Protection Clause and as a Reasonable Basis for Distinction.

The real substance of this controversy lies in the aptness and reasonableness of creating a class on the basis of citizenship. Defendant in error in his answer has alleged the justification for such a classification and insofar as facts are pleaded this justification must now be considered as admitted.

The answer alleged (Rec., p. 11):

"Respondent further says that as a class, persons who are not citizens of the United

> States are not as familiar with the laws and customs of the United States as are native born or naturalized citizens thereof, and that billiard and pool rooms and halls maintained by persons who are not citizens of the United States are therefore, a menace to society at large and the welfare of the public; that the ordinance complained of by the relator is a reasonable police regulation passed in the interests and for the benefit of the general public; and that said ordinance is a reasonable ordinance."

The Supreme Court of Ohio has twice passed upon the constitutionality of this ordinance. In *Balli* v. *Carrel*, 99 O. S., 285, decided in 1919 it held the ordinance constitutional and also in the present case decided in 1925. It is clear, therefore, that the question has received ample consideration by that court.

The precise justification pleaded in this case has received the approval of this court in *Terrace* v. *Thompson*, 263 U. S., 197.

In that case the Washington Alien Land Law was in question which prohibited aliens who had not in good faith declared their intention to become citizens from owning land. It was claimed that this denied to aliens the equal protection of the law. At page 220 this court says:

> "The classification is based on eligibility and purpose to naturalize * * * Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The state properly may assume that the considera-

tions upon which Congress made such classification are substantial and reasonable * * *. The rule established by Congress on this subject in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below * * * that:

"'*It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries*' * * *." (Italics ours.)

In *Patsone* v. *Pennsylvania*, 232 U. S., 138, this court held that a Pennsylvania statute making it unlawful for unnaturalized foreign born residents to kill wild game was not unconstitutional as denying equal protection of the law.

This court has held in several cases that a classification based upon citizenship was a valid one and did not deny equal protection of the law.

In *Cockrill* v. *California*, 268 U. S., 258, the court passed upon the constitutionality of a statute providing that a conveyance of real property was void if the interest conveyed was such that an alien is inhibited from possessing it; and that if the consideration was paid by an alien there should be a *prima facie* presumption of intent to avoid the statute. The court held the statute constitutional, saying, page 261:

"The statute is not repugnant to the equal protection clause * * *. Plaintiffs in error maintain that invalidity results from the fact that, where payment of the purchase price is made by an ineligible alien, the law creates a

> presumption of a purpose to prevent, evade or avoid escheat, while no such presumption arises where such payment is made by a citizen or eligible alien. But there are reasonable grounds for the distinction * * *. The fact that in California all privileges in respect of the acquisition, use and control of the land for agricultural purposes are withheld from ineligible Japanese constitutes a reasonable and valid basis for the rule of evidence."

In *Porterfield* v. *Webb*, 263 U. S., 225 the court held that the California Alien Land Law did not deny equal protection of the law. At page 233 the court says:

> "In the matter of classification, the states have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different states. We cannot say that failure of the California legislature to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable."

See also:

Webb v. *O'Brien*, 263 U. S., 313.
Frick v. *Webb*, 263 U. S., 326.

The case of *Anton* v. *Van Winkle*, 297 Fed., 340 (District Court D. Oregon) is a case involving the precise question raised in the case at bar. The Oregon laws prohibited the issuance of a pool or billiard hall license to any person not a citizen of the United States. The court held that this law did not violate the equal protection clause of the XIV Amendment.

Wolverton, District Judge says, page 342:

> "It may be judicially known, however, that aliens coming into this country are without the intimate knowledge of our laws, customs, and usages that our own people have. So it is likewise known that certain classes of aliens are of different psychology from our fellow countrymen. Furthermore, it is natural and reasonable to suppose that the foreign born, whose allegiance is first to their own country, and whose ideals of governmental environment and control have been engendered and formed under entirely different regimes and political systems, have not the same inspiration for the public weal, nor are they as well disposed toward the United States, as those who, by citizenship, are a part of the government itself. Further enlargement is unnecessary. I have said enough so that obviously it cannot be affirmed with absolute confidence that the legislature was without plausible reason for making the classification, and therefore appropriate discrimination against aliens as it relates to the subject of legislation. Much less can it be said that the enactment of the law complained against is a clear, unmistakable infringement of plaintiff's constitutional rights."

In *Gizzarelli* v. *Presbery*, 44 R. I., 333, the court considered an ordinance of the city of Providence providing that a license to operate a motor bus should not be granted to an alien. The court says, page 335:

> "Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire. We think fairly it may be

> said that as aliens as a class are naturally less interested in the state, the safety of its citizens and the public welfare than citizens of the state, to allow them to operate motor busses would on the whole tend to increase the danger to passengers and to the public using the highways. It is clear that we cannot say that the evil to be apprehended and the purposed remedy are so dissociated as to warrant the court in holding the ordinance to be invalid."

In *Peter Miller* v. *City of Niagara*, 207 App. Div., N. Y., 798, the court held that an ordinance prohibiting the issuance of a license to an al n to sell soft drinks did not violate the XIV Amendment. At page 800 the court says:

> "When we consider that the licensing at retail of the beverages mentioned in this act is based upon the theory that there is an evil to be guarded against, that connected with such business there are apt to be violations of the law * * * it may reasonably be said that the welfare of the community will be best served by excluding from licenses such persons as are not so attached to the institutions of our country as to be in the class of its citizenry. Under the principles stated then, we deem the classification valid."

In *State* v. *Rheaume*, 116 Atl. (N. H.), 758, the New Hampshire court held, Syl. 8:

> "Laws 1917c. 185 Secs. 6, 7, making it unlawful for one not a citizen of the United States and who has not declared his intention of becoming such to have firearms in his possession, is not in violation of Const. U. S. Amend. 14 relating to due process and denying equal pro-

tection of the laws, without regard to nationality, since such provision was not intended to interfere with the exercise of the police power by the states, and the statute does not make an unreasonable classification."

At page 763 the court says:

"Citizens as a class have more settled domiciles and are better known to the local police, officials, while the sojourn of aliens in this country, in theory, and usually in practice, is temporary, and their abode, while here, capricious and uncertain. Citizens by means of taxation bear the expense of the government and of police protection, while the alien does not necessarily pay any part of the public burden. Native citizens are justly presumed to be imbued with a natural allegiance to their government which unnaturalized aliens do not possess. The former inheret a knowledge and reverence for our institutions, while the latter as a class do not understand our customs or laws, or enter into the spirit of our social organization * * *. It is clear that there exists a reasonable and substantial basis for the classification."

In *Commonwealth* v. *Hana*, 195 Mass., 262, a Massachusetts statute provided that an alien could not procure a license as a hawker or peddler. It was contended that this denied to aliens the equal protection of the law.

The court said, page 265:

"If in the same interest (exercise of the police power) the legislature deems it important that licenses shall be granted only to citizens of the United States or to those who have declared their intention to become citizens, it

> can hardly be said that they have exceeded their constitutional right in passing a law to that effect * * *. (Quoting from *Trageser* v. *Gray*, 73 Md., 250, to the effect that aliens are not so apt to have regard for the welfare of the state, etc.) The same reasoning is equally applicable to the granting of licenses to hawkers and peddlers. Indeed, the nature of their business is such that their possession of a domicile and citizenship in this country might be important to those seeking remedies for wrongs done in their business * * *."

These cases follow the long line of decisions of this court justifying legislation that classifies on various bases. Without further quotation we shall confine ourselves to enumerating some of the various decisions.

In *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S., 304, this court held reasonable and constitutional an Alabama law classifying for license purposes the selling of sewing machines as between those sold through itinerant agents and those sold by merchants at "regular established places of business."

In *M. K. & T. Ry. Co.* v. *May*, 194 U. S., 267, a law prohibiting railroad companies from allowing Johnson grass and Russian thistle to go to seed on their right of way was held not to deny equal protection of the law.

In *Barrett* v. *Indiana*, 229 U. S., 26, the court held that a law applying to bituminous coal mines but not to block coal mines did not deny equal protection of the law.

In *Ohio, ex rel. Lloyd*, v. *Dollison*, 194 U. S., 445, the court held that an Ohio local option law excepting druggists, manufacturers and persons giving away liquor from its operation was valid under the XIV Amendment guaranteeing equal protection of the law.

Plaintiff in error seeks to distinguish cases involving statutes prohibiting or regulating the sale of liquor on the ground that that business is one peculiar to itself which might be wholly prohibited (Brief, p. 14). We submit that operating pool rooms is within that class of "non-useful" occupations that may be regulated or prohibited according to local conditions and that under the admitted facts of this case as to the evils resulting from their operation in Cincinnati, the city under its police power could refuse to grant any license.

This court in *Murphy* v. *California*, 225 U. S., 623, held that pool rooms were "non-useful occupations which may or may not be harmful to the public, according to local conditions or the manner in which they are conducted" and that "the regulation or prohibition need not be postponed until the evil has become flagrant" (629). The court therefore held that a law prohibiting pool rooms was constitutional.

In *Booth* v. *Illinois*, 184 U. S., 425, the court considered an Illinois statute prohibiting options in grain futures. The same contention was made as in the instant case, that such options were not immoral *per se*. At page 429 the court said on this point:

> "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be toward that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particuler calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say

> that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler* v. *Kansas*, 123 U. S., 623, 661; *Minnesota* v. *Barber*, 136 U. S., 313, 320; *Brimmer* v. *Rebman*, 138 U. S., 78; *Voight* v. *Wright*, 141 U. S., 62."

Anton v. *Van Winkle*, 297 Fed., 340, a case where pool room licenses were refused to aliens, follows these cases and holds, page 342:

> "If, in the light of these authorities, the statute in question had been for a prohibition of the business of maintaining billiard or pool halls, considering the character of the occupation as having a harmful or noxious tendency, there could be no question of the power of the legislature to ordain such prohibition under its police power."

We submit that under these authorities and the facts of this case the operation of pool rooms is such an occupation in Cincinnati that the city could prohibit the granting of licenses. This brings our case within the decisions relating to the liquor traffic.

In *Bloomfield* v. *Ohio*, 86 O. S., 253, the court considered the constitutionality of the Dean law providing that a liquor license could not be granted to an alien. The court held, page 266:

> "We do not think the statutes of Ohio, and of other states, which have barred aliens from the liquor traffic in the manner stated have arisen from a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under

> our institutions. But they are based on the belief that an alien cannot be sufficiently acquainted with our institutions, and our life to enable him to appreciate the relation of this particular business to our entire social fabric. When he has become more familiar with the spirit of the American people and their laws and has become a citizen, he will easily and readily (in the conduct of this business) assist in the furtherance of the policy of the state."

The case of *Tragesser* v. *Gray*, 9 L. R. A. 780 has become a leading case on this question. A Maryland statute provided that a license to sell liquor could be issued only to citizens of the United States of temperate habits and good moral character. The court held:

> "Syl. 2: A state's denial to persons not citizens of the United States of the right to obtain licenses to sell spiritous liquors within its borders is not a discrimination against them, or an abridgement of their rights within the prohibition of the XIV Amendment of the Constitution of the United States."

The Maryland court held at p. 784:

> "It was thought proper to confine the licenses to citizens of the United States of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the Legislature to confer it only on those who being natives of the country, might reasonably be supposed to have a regard for its welfare; or who not being natives had,

as required by Naturalization Law, proven by creditable testimony before a court of justice that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticize its conclusions. We do not think that this law is, in any manner, in conflict with the Constitution of this state."

* * * * * * * *

"It has been uniformly held in all courts that no clause in the Federal Constitution interferes with the power of the states to promote and protect the public health, peace, morals, and good order within their respective limits."

We submit, therefore, that the ordinance does not deny to Plaintiff in Error the equal protection of the laws; that acting under its police powers the city had the right to regulate or prohibit entirely the operation of pool rooms and that in exercising those powers it could classify those to whom licenses could be issued. In determining the reasonableness of a particular classification created by law the courts will recognize that the question is one of local experience and will not hold the classification unconstitutional unless they can hold that the basis upon which classes are created is an unreasonable one and not germane to the evil sought to be remedied. We have seen that the evils attendant upon the operation of pool rooms in Cincinnati are admitted and with this in mind, as well as the allegations of Defendant in Error relating to the operation of pool rooms by aliens, we submit that upon the authorities cited the distinction drawn

by the ordinance between aliens and citizens cannot be said to be an unreasonable exercise of the police power or to bear no relation to the control and correction of the conditions sought to be remedied.

III.

Plaintiff in Error's Rights Under the British Treaty and Under the XIV Amendment are the Same.

Thus far we have discussed this case as though there were two distinct issues involved. We have done so only because Plaintiff in Error chose to present his case in that manner. We submit, however, that whether Plaintiff in Error claims the protection of the British treaty of 1815 or of the equal protection clause of the XIV Amendment to the Constitution the same question is raised,—does the ordinance deny to aliens the equal protection of the law. The British treaty at the most guarantees to British subjects the same rights accorded to "other foreigners" and by the broadest possible construction its only grants to them the "most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries respectively." The XIV Amendment, applying as it does to aliens as well as citizens, really gives a more comprehensive right which embraces and overshadows the rights granted by the treaty. At the same time the treaty rights are expressly made subject to the Constitution. So that whether we approach this question from the point of view of the treaty or from the point of view of the Constitution, we come to the fundamental question of the validity of the classification created by the ordinance. If that

classification be valid under the Constitution it is valid under the terms of the British treaty of 1815.

IV.

Summary.

In conclusion, we submit that the fundamental question in this case is whether the classification created by the ordinance is a valid one. Plaintiff in Error has failed to establish his status as a British subject and is therefore not entitled to the protection of the treaty; nor does the language of the British treaty cover such a non-useful occupation as operating pool and billiard halls. The Plaintiff in Error's rights are measured by the Constitution rather than the treaty since the treaty rights are expressly made subject to the Constitution.

Under the XIV Amendment, the ordinance offers aliens the equal protection of the laws. The Amendment does not deny to the States the exercise of their police power and, as we have seen, in the case of pool rooms the Constitution of Ohio vests the police power in the city. The operation of pool rooms in general, and particularly under the admitted facts of this case, calls for an exercise of the police power by the city either by way of regulation or prohibition. The City Council has, in its legislative discretion, sought to meet this situation by limiting the permission to operate to citizens of the United States and the courts will not disturb such a classification of persons unless it can be held that the basis of classification is clearly unreasonable and bears no relation to the conditions the council seeks to control. We have seen that in general aliens are not accustomed to American institutions, do not comprehend our social problems nor

understand our laws and traditions. Courts have in many cases cited herein held that these considerations offer a basis for distinction between alien and citizen that will not be held unwarranted by the XIV Amendment.

We submit, therefore, that the Supreme Court of Ohio was not in error in refusing to grant Plaintiff in Error's petition for mandamus and that the judgment of that court should be affirmed.

Respectfully submitted,
JOHN D. ELLIS,
City Solicitor of Cincinnati, Ohio.